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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1396

MICHELIN TIRE CORPORATION,

Petitioner,

vs.

W. L. WAGES, Tax Commissioner, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

REPLY BRIEF FOR THE PETITIONER

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A. Congress, Rather Than This Court, Is The Appropriate Tribunal To Consider And Pass On The Arguments Which Are Relied Upon By The Tax Officials In Support Of Their Request That This Court Overrule *Brown* v. *Maryland*, *Low* v. *Austin* And Other Decisions Interpreting And Applying The Import-Export Clause.

It is understandable that state and local tax officials would be zealous in their efforts to enlarge their taxing power by attempting to confine limitations imposed thereon by the Federal Constitution, and in their respective briefs the Respondents and the California, Georgia and Kansas Amici present with impressive skill and thoroughness various arguments in favor of limiting drastically the immunity of imported goods from local taxation.

The arguments presented on behalf of the tax officials fall into two groups, as follows:

First, are arguments which ask this Court to overrule *Brown* v. *Maryland, Low* v. *Austin* and other decisions interpreting and applying the Import-Export Clause. As more fully shown below under this heading, we believe that Congress, rather than this Court, is the appropriate tribunal to consider and pass on this group of arguments.

Second, are various arguments presented by the tax officials which would lead to the result that unpackaged imports are entitled to a lesser degree of immunity under the Import-Export Clause than is recognized in the case of packaged imports. This group of arguments will be discussed under subsequent headings of this Reply Brief.

Whether or not the first group of arguments, if presented to the tribunal which has authority to restrict the scope of operation of the Import-Export Clause, would be effective to produce the results sought by the tax officials, we do not undertake to determine. In such event opposing policy arguments would of course be presented to the tribunal, including those which led the Framers of the Federal Constitution to adopt the Import-Export Clause. Such opposing policy arguments would include the desirability of giving to the Federal Government exclusive control over imports, in order to avoid a situation such as existed in Europe prior to the establishment of the Common Market; the desirability of providing the Federal Government with a source of revenue, consisting of duties imposed on imports; and the benefit to citizens of inland states where the imported goods will come to rest at a final destination, of having such imported goods flow through to such final destination states without being burdened by taxes by the seaboard states or other states through which the imported goods pass on their way to the state of final destination.

Insofar as the tax officials' arguments ask this Court to overrule *Brown* v. *Maryland, Low* v. *Austin* and other decisions of this Court interpreting and applying the Import-Export Clause, we believe that the tax officials are really asking this Court, in practical substance and effect, to revise and amend the Import-Export Clause. For example, the tax officials ask this Court to hold that the Import-Export Clause prohibits, not "any" tax, but "any discriminatory" tax. Such argument was rejected by this Court in *Low* v. *Austin,* 13 Wall. 29 (1872), and was rejected again in *Richfield Oil Corporation* v. *State Board of Equalization,* 329 U.S. 69 (1946), in which the Court said, at 76: "It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against 'any' tax a prohibition against 'any discriminatory' tax."

By its very terms, the Import-Export Clause gives Congress exclusive authority to consider and then consent to, or disapprove, a tax on imports by the States. Therefore, Congress, and not this Court, is the appropriate tribunal to consider the policy arguments which in substance and practical effect ask this Court to revise and amend the Import-Export Clause. This Court, in *Hooven and Allison Co.* v. *Evatt,* 324 U.S. 652 (1945), at 668, has already held that the Import-Export Clause gives to Congress the authority to consent to state taxation of imports and hence to lay down its own test for determining when the immunity ends.

If the tax officials can persuade Congress that their policy arguments are sound, Congress will no doubt enact legislation to produce the result sought by such tax officials. In any event, the Import-Export Clause by its terms requires such consent, and the procedure established by the Constitution should be followed.

B. Unpackaged Imports Should Not Have A Lesser Degree Of Immunity From Local Taxation Than Is Recognized Where Packaged Imports Are Involved.

There is an unexplained inconsistency in the Supreme Court of Georgia's decision. The Georgia Court correctly holds that the packaged imported tubes are immune from local taxation under the "original package" doctrine, notwithstanding the fact that such tubes are segregated by size and style, and are stacked with other packaged imported tubes of the same size and style in Michelin's warehouse. Yet the Georgia Court holds that segregating and stacking unpackaged imported tires in exactly the same manner results in loss of immunity from taxation. (A. 36; and pages A-17 and A-18 of Appendix to Michelin's Petition For A Writ Of Certiorari)

It will thus be seen that:

First, with respect to the imported unpackaged tires, Michelin is asking for immunity from local taxation only to an extent parallel and comparable to that which is recognized with respect to packaged imports.

Second, the Georgia Court has held, and the tax officials are asking this Court to hold, that unpackaged imports have a lesser degree of immunity from local taxation than is recognized in the case of packaged imports.

We respectfully submit that no persuasive reason can be given which would justify such discrepancy of treatment, and that the aim and purpose of the Import-Export Clause is to allow with respect to all imported goods, whether packaged or unpackaged, a uniform degree of immunity from local taxation.

C. The "Original Form" Factor.

In *Brown* v. *Maryland*, Chief Justice Marshall said that if "the thing imported" is held by the importer, in his warehouse, in the "original form or package" in which it was imported, it is immune from local taxation. 12 Wheat. 441-442.

The natural and reasonable meaning of the language just quoted from *Brown* v. *Maryland* is that if "the thing imported" was imported in a package, it must remain in the "original package" in which it was imported in order to retain immunity from local taxation, or, if "the thing imported" was imported without packaging, it must remain in the unaltered "original form" in which it was imported in order to retain immunity from local taxation. As shown at pages 8-9 of our Main Brief, the Courts of New York, North Carolina and Florida have held that, with respect to unpackaged imports, the words "original form" have the meaning which we have just described.

If the words "original form" are given, with respect to unpackaged imports, the meaning which we have just suggested as being the reasonable and natural meaning of such words, the result will be that the unpackaged imports will be accorded a degree of immunity from local taxation parallel and comparable to that which is recognized with respect to packaged imports which are held by the importer in the "original package" in which they were imported. Controversies over what amount of wrapping constitutes a package will not arise and strained mechanical rules of law based on distinctions without differences need not be developed. Sensible certainty will be brought to the meaning of the Import-Export Clause without encouraging importers to mock reality by packaging things imported where it makes no sense to do so.

In their briefs, the tax officials try to ascribe to the words "original form" certain narrow and unnatural meanings which would result in unpackaged imports being accorded a lesser degree of immunity from local taxation than what is recognized in the case of packaged imports.

In the California Amici Brief, at page 64, it is suggested that "the original form had reference to the collective form of the goods as shipped." In *Brown* v. *Maryland,* Chief Justice Marshall spoke in terms of whether or not "the thing imported" was held by the importer in the "original form or package" in which it was imported. It is hard to believe that when he referred to "the thing imported" what he really had in mind was "the collective form of the goods as shipped".

In the Georgia Amicus brief, at page 44, the argument is made that: "Thus the term 'original form' is properly applicable apart from the term 'original package' only when used in reference to items incapable of packaging or capable of physical processing, such as ores, oil, etc." We do not believe that the language used by Chief Justice Marshall in *Brown* v. *Maryland,* as shown above, can reasonably be read as carrying the limited and unnatural meaning ascribed to the words "original form" in the sentence just quoted from the Georgia Amicus Brief.

Except as otherwise indicated in the two preceding paragraphs, the tax officials apparently ask the Court to ignore and disregard, and to treat as being meaningless, the words "original form" which have been repeatedly used by this Court in the *Brown* v. *Maryland* line of decisions.

To summarize, we respectfully submit that the tax officials have failed to give any convincing answer to Michelin's argument that the unpackaged imported tires, while in Michelin's warehouse, were in the "original form" in

which they were imported, and therefore, under the "original form or package" doctrine, were immune from local taxation.

D. The Importer's Right To Sell The Imported Goods, In The Original Form Or Package In Which Imported, Free Of Local Taxation.

In support of our argument that Michelin has the right to sell the imported tires, in the "original form" in which imported, free of local taxation, we rely on *Brown* v. *Maryland,* and on the fact that in *Youngstown Sheet and Tube Company* v. *Bowers,* 358 U.S. 534 (1959), the Court, at 540, quoted with approval from *Brown* v. *Maryland* the statement that one who had imported a "thing" for the purpose of selling it, had, "by payment of the duty to the United States, [acquired the] right to dispose of his merchandise, as well as to bring it into the country," and that the State could not tax it "while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported." In note 7 to the *Youngstown* decision, the Court affirmatively stated that it is "well-settled" that goods imported for sale lose their character as imports "upon being sold." 358 U.S. 541. This position cannot be reconciled with the tax officials' position that goods imported for sale lose their character as imports at some point prior to sale.

The tax officials present a number of arguments as to why the imported tires should become subject to local taxation prior to their being sold by Michelin. Such arguments will be discussed under other headings below in this Reply Brief. At this point, we limit our comment on such arguments to pointing out that, in order to accept any one or more of such arguments, this Court would have to overrule *Brown* v. *Maryland,* and would have to disaffirm what it

reaffirmed in *Youngstown,* as shown above, namely, that the importer does acquire, by payment of the import duty, the right to sell the imported goods, in the original form or package in which they were imported, free of local taxation.

We respectfullly submit that the decisions in *Brown* v. *Maryland* and in *Youngstown* are sound and correct; that such decisions should be followed; and that the tax officials should look to Congress, and not to this Court, for the relief which they are seeking.

E. The "Final Destination" Factor.

We believe that substantial weight should be given to the fact that the imported tires flow out from Michelin's warehouse to tire dealers scattered throughout six states, and it is such tire dealers who sell the tires at retail, and for local consumption, at the point of "final destination".

In support of our view, we rely on the following:

First, one of the important reasons for the inclusion in the Federal Constitution of the Import-Export Clause was the desire to prevent the seaboard states from levying taxes on goods flowing through to inland states. 2 Farrand, Records of the Federal Convention (1911), 441, 442. In *Youngstown* the Court said: "The constitutional design was then to immunize imports from taxation by the importing States, and all others through or into which they may pass, so long as they retain their distinctive character as imports." 358 U.S. 545.

Second, the itinerant peddler example referred to in *Brown* v. *Maryland* indicates that Chief Justice Marshall meant to attach considerable weight to the "final destination" factor, because it is reasonable to assume that an itinerant peddler would normally sell the imported goods

at retail, and for local consumption, at the point of final destination.

Third, in *Youngstown,* the Court gave major weight to the fact that the "importation journey definitely had ended" and that the imported materials were irrevocably committed to use in manufacturing at the "point of final destination". 358 U.S. 546.

In support of their effort to disregard the "final destination" factor, the tax officials advance the following arguments:

In the Georgia Amicus Brief, at pages 38-39, it is argued that the tires, while in Michelin's warehouse, should not be considered as being in the flow of import distribution, because events might possibly happen which would result in some one or more of the tires remaining in such warehouse indefinitely. We respectfully submit that the kind of remote possibility just referred to is substantially outweighed by the uncontradicted evidence showing that the tires flow out from Michelin's warehouse to tire dealers scattered throughout six states (A. 26, 29, 53-54), and by the Georgia Supreme Court's statement that: "All the tires and tubes in the Gwinnett warehouse are sold to franchised Michelin dealers in six southeastern states." (Page A-8 of Michelin's Petition For A Writ of Certiorari)

The California Amici, at pages 65-67 of their Brief, discuss our "flow of import distribution" argument but cite no persuasive authority in support of their attempt to disregard and ignore the "final destination" factor. The Dakin article, referred to at page 67 of the California Amici Brief, gives major weight and emphasis to the "final destination" factor, and clearly recognizes that imported goods should retain their immunity from local taxation while "still in the hands of the importer and held for possible

sale into the interior part of the country". Dakin, 19 La. Law Review 760; and see also the discussion at pp. 766, 770 and 774.

To summarize, the tax officials have shown no persuasive reason why the "final destination" factor should be disregarded and ignored. For reasons shown above, we believe that such "final destination" factor should be given substantial weight in determining whether or not the imported tires, while in Michelin's warehouse, were still in the flow of import distribution and were still imports.

F. The "Segregating By Size And Style" Factor.

For the reasons set forth below, we believe that the tax officials' "segregating by size and style" argument is unconvincing and should be rejected.

Our view is based on the following considerations:

If applied to unpackaged imports only, the tax officials' "segregating by size and style" argument would result in holding that unpackaged imports have a lesser degree of immunity from local taxation than is recognized where packaged imports are involved. If applied to packaged imports as well as to unpackaged imports, the result would be to overrule to a major extent, with respect to packaged imports, the "original package" doctrine established by the *Brown* v. *Maryland* line of decisions.

Segregating and stacking the imported tires by size and style does not change the "original form" in which each tire is imported, and therefore, under the *Brown* v. *Maryland* line of decisions, the imported tires are immune from local taxation because they are held by Michelin, in its warehouse, in the "original form" in which they were imported.

In order to accept the tax officials' contention, the Court would have to overrule the *Brown* v. *Maryland* holding

that an importer, by payment of the federal import duty, acquires the right to sell the imported goods, in the original form or package in which they were imported, free of local taxation.

Segregating the tires by size and style does not alter the fact that the tires flow out from Michelin's warehouse to tire dealers scattered throughout six states, and therefore, while in such warehouse, are still in the flow of import distribution, and are still imports. It is such tire dealers who, like the itinerant peddler referred to in *Brown* v. *Maryland*, sell the tires at retail, and for local consumption, at the point of final destination.

The courts of Florida and North Carolina have correctly held, as shown at page 13 of our Main Brief, that segregating unpackaged imported goods by size and style, and stacking them with other unpackaged imported goods of the same size and style, does not result in loss of immunity from local taxation, so long as each unpackaged article is kept in the "original form" in which it was imported.

The tax officials, in support of their position, rely on the following arguments:

They argue that by segregating the imported tires by size and style, Michelin is engaging in business as a wholesale distributor, with resulting loss of immunity from local taxation. Their argument appears to be that an importer can engage in the business of acting as importer, without loss of immunity from local taxation, but if the importer engages in the business of selling the imported goods as a wholesale distributor, there is a resulting loss of immunity from local taxation. Under such view, an importer, in order to retain immunity from local taxation, apparently would be required to import the goods solely for the purpose of doing nothing at all with them. Such an argument cannot

be reconciled with the holding in *Brown* v. *Maryland*, which this Court affirmed in *Youngstown*, that the importer, by payment of the import duty, acquires the right to sell the goods, in the original form or package in which they were imported, free from local taxation.

The tax officials rely heavily on several state court decisions holding that the entire shipment is an "invisible gossamer" which is broken when any single article is removed from the shipment. This "invisible" package argument is answered at pages 15-16 of our Main Brief. If applied in the case of unpackaged imports only, such "invisible" package argument would result in an unjustifiable discrepancy of treatment as between packaged imports and unpackaged imports. If applied to packaged imports also, such "invisible" package argument would be in direct conflict with the *Brown* v. *Maryland* "original package" doctrine because, in such event, the packaged imports would lose their immunity from local taxation if any single packaged import is removed from the entire shipment, notwithstanding the fact that all of the packaged imports are at all times held by the importer in the "original package" in which imported.

The tax officials say that their argument here discussed is supported by the decision in *May* v. *New Orleans*, 178 U.S. 496 (1900). *May* v. *New Orleans* holds that where a shipping carton containing smaller packages of imported goods is opened by the importer, the breaking of such "original package" shipping carton results in loss of immunity from local taxation. The decision is rested entirely on the ground that an "original package" was broken, which everyone admits results in loss of immunity from local taxation. In our case here, no "original package" was broken because the tires were imported without packaging and there never was any "original package" to

break. *May* v. *New Orleans* is completely silent with respect to goods imported without packaging. We fail to see how a decision which is rested solely and exclusively on the ground that an "original package" was broken by the importer can be considered as having any bearing on a situation where no "original package" has been broken by the importer. Incidentally, Michelin has given full effect to the soundness of the *May* v. *New Orleans* principle by admitting taxability with respect to imported tubes where the tubes remain in their individual packages but such individual packages are removed from the larger shipping carton. (A. 10, 11, 35)

To some extent, the tax officials seem to interweave their "segregation of goods by size and style" argument, here discussed, with their arguments based on the decision in *Youngstown*. The *Youngstown* decision is discussed under heading G below, and we show there that, contrary to the tax officials' contentions, the decision in *Youngstown* helps Michelin's case and hurts the tax officials' case.

For the reasons set forth above, we respectfully submit that the tax officials' "segregation by size and style" argument is unsound, is inconsistent with the *Brown* v. *Maryland* line of decisions, and should be rejected.

G. The *Youngstown* Decision.

In *Youngstown*, as we have shown under Heading D above, the Court quoted with approval from *Brown* v. *Maryland* the statement that an importer acquires, by payment of the import duty to the United States, the right to sell the imported goods, in the original form or package in which they were imported, free of local taxation. Under this principle, Michelin is entitled to sell the imported tires in the original form in which they were imported, free of local taxation.

As we have shown under Heading E above, the Court in *Youngstown* gave major weight to the fact that the "importation journey definitely had ended" and that the imported materials were irrevocably committed to use in manufacturing at the "point of final destination". In our case, the "final destination" factor works strongly in Michelin's favor, by reason of the fact that the imported tires flow out from Michelin's warehouse to dealers scattered throughout six states, and it is such dealers who sell the tires at the point of final destination.

The tax officials' reliance on *Youngstown* centers around the statement in *Youngstown* that the imported materials there involved, which were imported for use in the importer's manufacturing operation, became taxable when they were "put to the use for which they were imported". The Court held that such imported materials, to the extent that they were required to be kept on hand at the importer's manufacturing plant to meet current operational needs, had been put to the use for which they were imported.

The tax officials' argument is that where goods are imported for the purpose of being sold by the importer, such imported goods have been "put to the use for which they were imported" when the importer gets ready to sell them or offers them for sale. Our view is that where goods are imported for the purpose of being sold by the importer, such goods have not been "put to the use for which they were imported" until they are sold. This is clearly the view of *Brown* v. *Maryland*, and is clearly the view which the Court in *Youngstown* had in mind when it quoted with approval from *Brown* v. *Maryland*, the statement that one who had imported goods for the purpose of selling them, had, by payment of the duty to the United States, acquired the right to sell the goods, in the original form or package in which they were imported, free of local taxation.

It has always been recognized that immunity from local taxation ceases when the importer "uses" the imported goods for his own use. Where goods are imported for the importer's own use, close questions can arise, as in *Youngstown*, as to when such use by the importer has commenced. In *Youngstown*, the Court decided a close question as to when such use by the importer-manufacturer had commenced. The Court did not question in any way the soundness of the *Brown* v. *Maryland* "original form or package" doctrine.

By contrast, where goods are imported by the importer for the sole purpose of selling them in the original form or package in which they were imported, the line of demarcation as to when immunity from local taxation ends is much more definite and certain, because *Brown* v. *Maryland* holds, and the Court in *Youngstown* affirms, that in such event immunity from local taxation continues until the sale by the importer takes place, and because there is little room for dispute about whether the goods have or have not been sold.

To conclude that the importer, by merely offering the imported goods for sale, or by getting ready to sell them, has put them to the use for which they were imported, with resulting loss of immunity from local taxation, the Court would have to overrule the holding in *Brown* v. *Maryland*, which the Court approved in *Youngstown*.

We respectfully urge that the *Brown* v. *Maryland* line of decisions has provided, for nearly 150 years, a sound and reasonable criterion for determining when imported goods cease to be imports for the purpose of the Import-Export Clause, and that, if the tax officials feel that the immunity from local taxation should be drastically reduced from that which exists under the *Brown* v. *Maryland* line

of decisions, they should look to Congress, and not to this Court, for the relief sought.

H. The Tax Officials' Argument That The Import-Export Clause Does Not Prohibit A Non-Discriminatory Ad Valorem Property Tax.

This argument, which is urged at great length and with great skill in the California Amici Brief, was presented on behalf of the State of California, and was rejected by a unanimous court, in *Low* v. *Austin,* 13 Wall. 29 (1872). The summary of argument presented on behalf of the State of California in *Low* v. *Austin,* as set forth at 20 L. Ed. 517-518, reads like a summary of the argument made here on behalf of the California tax officials in their Amici Brief.

As shown under heading A above, in 1946 the Court again, in *Richfield Oil,* refused to hold that a non-discriminatory local tax is permitted by the Import-Export Clause, and stated that it would entail a substantial revision of such Clause to substitute for the prohibition against "any" tax a prohibition against "any discriminatory" tax.

The California Amici, at page 30 of their Brief, argue that the words "impost" and "duty" do not include a non-discriminatory property tax. A similar argument was advanced on behalf of the State of California in *Low* v. *Austin,* as shown at 20 L. Ed. 518, and was rejected by the Court. Webster's Third New International Dictionary defines "impost" as follows: "1: something imposed or levied: TAX, TRIBUTE, DUTY 2: the weight carried by a horse in a handicap race." Under the definition just quoted, the word "impost" would clearly include any tax, and this Court has correctly so held in *Brown* v. *Maryland,* in *Low* v. *Austin* and in *Richfield Oil.*

The tax officials invoke and rely on *Minnesota* v. *Blasius,* 290 U.S. 1 (1933), and decisions referred to therein, which hold that, where the Commerce Clause alone is involved, and the Import-Export Clause is not involved, a non-discriminatory local tax may be imposed on the goods involved during an interruption of transit in interstate commerce.

The Commerce Clause decisions are clearly inapplicable in our case because this Court has repeatedly and emphatically held, over a long period of years, that there is an important distinction between the degree of local taxation which is permitted under the Import-Export Clause and that which is permitted under the Commerce Clause of the Federal Constitution. The decisions so holding include *Woodruff* v. *Parham,* 8 Wall. 123 (1869); *Brown* v. *Houston,* 114 U.S. 622 (1885); *American Steel and Wire Company* v. *Speed,* 192 U.S. 500 (1904); and *Sonneborn Bros.* v. *Cureton,* 262 U.S. 506 (1923).

Thus, in *Sonneborn Bros.,* supra, the Court said, at 510: "Cases subsequent to *Brown* v. *Maryland* show that the analogy between imports and articles in original packages in interstate commerce in respect of immunity from taxation fails. The distinction is that the immunity attaches to the import itself before sale, while the immunity in case of an article because of its relation to interstate commerce depends on the question whether the tax challenged regulates or burdens interstate commerce."

In *American Steel and Wire Co.,* supra, at 521, the distinction between the two situations was described as follows: "Thus, in *Brown* v. *Maryland* there was an absolute want of power to tax imports, and it was held that a state enactment which operated to tax imports, whether directly or indirectly, was within the positive prohibition.

In other words, that imports could not be taxed at all until they had completely lost their character as such. *Woodruff* v. *Parham* and *Brown* v. *Houston,* on the other hand, so far as interstate commerce was concerned, dealt with no positive and absolute inhibition against the exercise of the taxing power, but determined whether a particular exertion of that power by a state so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress."

In order to sustain the tax officials' argument that the Import-Export Clause permits non-discriminatory local taxation, the Court would have to overrule all of the decisions cited above under this heading H.

We respectfully submit that such decisions are sound and correct; that such decisions are based upon a most thorough and careful consideration of what the Framers of the Federal Constitution intended; that such decisions should be followed in our case; and that if the tax officials desire to press further their policy argument in favor of permitting non-discriminatory local taxation of imported goods, they should look to the Congress, and not to this Court, for relief.

I. The Vehicle Of Transportation Argument.

The tax officials' argument that the sea van trailer or other vehicle of transportation should be considered as being an "original package" is answered at pages 18-19 of our Main Brief, and need not be discussed further except to re-emphasize the fact that treating the vehicle of transportation as being an "original package" would wipe out almost entirely all immunity from local taxation of imported goods, both packaged and unpackaged, because in every case the imported goods must be brought into this country in some vehicle of transportation, and the vehicle

of transportation must be promptly unloaded in order to free it for further use in transportation.

J. Michelin's Reason For Shipping Tires Without Packaging.

The tax officials are mistaken in their suggestion that Michelin ships the imported tires without packaging in order to obtain immunity from local taxation. It ships the tires without packaging because none is necessary. If it had shipped each tire in a cardboard carton, the Supreme Court of Georgia would undoubtedly have held, as it held with regard to the packaged tubes, that such packaged tires were immune from local taxation.

K. Petitioner Is The Importer Of The Tires And Tubes.

The tax officials' suggestion that Michelin Tire Corporation, the Petitioner herein, is not the importer of the tires and tubes in question is refuted by the affidavit testimony of Roland A. Lacroix, which clearly shows that the Petitioner herein is the importer. (A. 63, 28)

There is nothing to the contrary in the testimony of Robert E. Stone, who testified that he did not know who was the importer, and that a broker was employed simply to help with the documentation necessary for the importing of the tires and tubes into this country. (A. 42-43, 50)

L. Taxability Of The Imported Tubes.

Some of the tax officials argue that the packaged tubes as well as the unpackaged tires should be held taxable. The Supreme Court of Georgia held that the packaged tubes are not taxable (page A-18 of Michelin's Petition For A Writ Of Certiorari), and the Gwinnett County tax officials did not file a Cross Petition for Certiorari. This Court has held that a respondent may not attack in this Court that portion of a judgment below which is adverse

to him, unless he sought certiorari to review such portion of the judgment below. *LeTulle* v. *Scofield,* 308 U.S. 415 (1940).

M. The Tax Officials' "Dockside Warehouse" Argument.

The tax officials ask the Court to hold that the importer's warehouse, at which the imported goods are held in the original form or package in which they were imported, must be located at or near the dockside in order for the imported goods to retain their immunity from local taxation.

There is no suggestion in *Brown* v. *Maryland* that the importer's warehouse must be located at or near the dockside, and there is no way in which the tax officials' "dockside warehouse" argument can be reconciled with the holding in *Brown* v. *Maryland* that the importer is entitled to sell the imported goods, in the original form or package in which they were imported, free of local taxation.

N. The Tax Officials' Arguments Based On The Fifth And Tenth Amendments.

In support of their argument that the seaboard states should be permitted to levy a non-discriminatory property tax on imports flowing through to inland states, the California Amici invoke the Fifth Amendment implied guaranty of equal protection and the Retained Powers Clause of the Tenth Amendment.

Here again, under guise of asking the Court to interpret the Import-Export Clause, the California Amici are really asking the Court to amend the Import-Export Clause, for, as the Court said in *Richfield Oil,* supra: "It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against 'any' tax a prohibition against 'any discriminatory' tax." 329 U.S. 76.

The Framers of the Constitution made a policy decision that seaboard states should not, without the consent of Congress, be permitted to levy any tax on imports flowing through to inland states, except what might be absolutely necessary for executing their inspection laws. The California Amici are asking this Court to reverse that policy decision by permitting seaboard states to levy substantial taxes on imports flowing through to inland states.

O. Decisions Involving Exports.

Decisions involving goods exported from this country are not relevant in our case here, because:

First, where exports are involved, there is nothing comparable to the *Brown* v. *Maryland* "original form or package" doctrine which is of central importance in our case.

Second, where exports are involved, there is nothing comparable to the *Brown* v. *Maryland* holding that an importer, by payment of the import duty, acquires the right to sell the imported goods, in the original form or package in which they were imported, free of local taxation.

P. The Tax Officials' *Clyde Mallory* Argument.

Clyde Mallory Lines v. *Alabama,* 296 U.S. 261 (1935), relied upon by the tax officials, holds that a service charge, which is not a tax, is not prohibited by the Article I, Section 10, Clause 3 prohibition against a duty of tonnage. In our case, the amount sought to be collected by the Gwinnett County tax officials is clearly a tax, and not a service charge.

CONCLUSION

For the reasons set forth above, it is respectfully urged that this Court should reverse that portion of the Supreme Court of Georgia's decision which holds the imported tires to be taxable, and should hold that such imported tires are immune from local taxation.

Respectfully submitted,

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Certificate of Service

I hereby certify that all parties required to be served have been served and that on this 7th day of October, 1975, I forwarded by U. S. air mail, postage prepaid, three copies of the foregoing Brief to each of the following:

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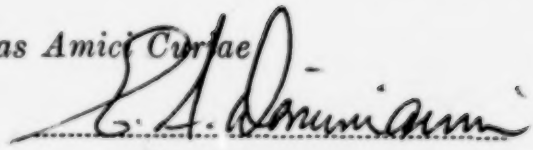

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